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DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-213196 **DATE:** January 3, 1984

MATTER OF: Urban Masonry Corporation

DIGEST:

1. GAO will not disturb a procuring agency's determination that a firm is nonresponsible when that determination is reasonably based on firm's inability to demonstrate compliance with experience requirements contained in IFB.

2. A procuring agency is not required to delay award indefinitely while a bidder attempts to cure the causes for the firm being found nonresponsible. Where the low bidder fails to supply required information prior to day of contract award, after having ample opportunity to do so, an agency reasonably may find the low bidder nonresponsible.

3. Offeror found to be nonresponsible is not "interested" party under our Bid Protest Procedures to protest award to next low bidder where it does not appear that circumstances would lead to cancellation and resolicitation of procurement. However, GAO will review second low offeror's status due to court interest in our views.

4. Protest that awardee did not meet definitive responsibility criterion concerning experience is denied where record indicates awardee submitted adequate evidence from which the contracting officer could reasonably conclude that criterion had been met.

Urban Masonry Corporation (Urban) protests the rejection of its bid as nonresponsible and the subsequent award of a contract to Sherman R. Smoot Co., Inc. (Smoot), under invitation for bids (IFB) No. 0235-AA-02-0-3-CC, issued by the District of Columbia Government (District).

The protest is denied.

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On May 31, 1983, the District issued the IFB for precast concrete work necessary for the construction of the District's Municipal Office Building. Three bids were submitted in response to the solicitation; they were opened on July 14, 1983, with the following results:

Bidder	Amount
Urban Masonry Corporation	$1,948,000
Sherman R. Smoot Co., Inc.	2,100,000
G & C Construction	2,120,000

Because Urban was the low bidder, the District asked Urban to submit additional data to determine if it was able to comply with the "sheltered market" and experience requirements of the solicitation. On September 15, 1983, the contracting officer rejected Urban's bid as nonresponsible because he believed Urban could not comply with the experience requirements contained in the IFB. Urban filed a protest with our Office on September 26, 1983.

On November 2, 1983, the District's contracting officer notified Urban and our Office that it intended to award the contract during the pendency of the bid protest. The contract was awarded to Smoot on November 4, 1983. Subsequently, Urban filed suit in the Superior Court of the District of Columbia (Urban Masonry Corp. v. District of Columbia, and John E. Touchstone, Director, Department of General Services, Civil Action No. 13208-83), seeking to enjoin the contractor from beginning work. By order dated November 29, 1983, the court requested our decision on the protest before it ruled on the claim for injunctive relief.

As a general rule, GAO will not consider issues raised in a bid protest where the same issues are before a court of competent jurisdiction. However, where, as here, the court expresses an interest in obtaining our views, we will provide the court with our decision. 4 C.F.R. § 20.10 (1983).

RELEVANT SOLICITATION PROVISIONS

The District's determination that Urban is nonresponsible is based on the District's interpretation of two provisions of the solicitation.

Pursuant to the District Government's "sheltered market" program, D.C. Code 1-1147 (1981), the IFB required the prime contractor to perform at least 50 percent of the

work itself and to ensure that at least 50 percent of all subcontracts were awarded to minority firms certified by the Minority Business Opportunity Commission. The relevant provisions state:

> "§ 1-1147. Assistance programs for minority contractors
>
> "(a) To achieve the goals set forth in § 1-1146, programs designed to assist local minority contractors shall be established by the [Minority Opportunity Business] Commission . . .
>
> "(b) The Commission shall include among these programs a sheltered market approach to contracts. Only certified minority business enterprises are eligible to participate in any sheltered market program established pursuant to this subsection.
>
> "(c) The prime contractor shall perform at least 50 percent of the contracting effort, excluding the cost of materials, goods and supplies, and if he subcontracts, 50 percent of the subcontracting effort excluding the cost of materials, goods and supplies shall be with certified minority business enterprises."

Because the erection and installation of precast concrete was a critical part of the bid package, the District also included the following definitive responsibility criteria in the quality assurance portion of the IFB:

> "Installer shall be regularly engaged for a minimum of 5 years in the erection of architectural precast concrete units similar to those required for the project."

NONRESPONSIBILITY DETERMINATION

After bids were opened on July 14, 1983, the District met with Urban to determine if Urban met all responsibility criteria prior to making award. Urban was asked to submit a Prime Contractor Employment Data Form, which it did on July 29, 1983. This form provided the District with information regarding a prime contractor's proposed subcontractors to determine if Urban's bid complied with the "sheltered market" requirements of D.C. Code § 1147(c) (1981).

Urban's Prime Contractor Employment Data Form indicated that Urban intended to subcontract 90 percent of the precast concrete erection work to a nonminority subcontractor, Erection Specialties, Inc. On August 8, 1983, the District informed Urban that Urban would violate the sheltered market requirements if it subcontracted more than 50 percent of the work or if it subcontracted such work to a nonminority subcontractor. Urban was given 10 days in which to resubmit the Contractor Data Forms.

The new forms, submitted on August 15, 1983, indicated that Urban would perform the precast concrete work with its own employees, thus, satisfying the sheltered market requirements.

At a meeting on August 31, 1983, District officials questioned Urban's ability to satisfy the experience requirements contained in the IFB. Urban stated that it had retained the services of a consultant with 29 years experience in precast concrete work. The consultant was to spend 60 to 80 percent of his time working for Urban. The consultant's resume indicated that he was employed by Erection Specialties, Inc., the formerly-proposed subcontractor.

The District concluded that Urban was not "regularly engaged" in the erection of precast architectural concrete and that Urban's attempt to comply with the experience requirement by retaining the services of a part-time consultant who had the requisite experience was not sufficient to satisfy the experience criteria of the IFB. Furthermore, the District contends that Urban attempted to circumvent the sheltered market requirements by calling the subcontractor a consultant. The District believed that it had to reject Urban's bid as nonresponsible since, to do otherwise, would directly violate the sheltered market provisions of the solicitation which required the contractor to perform 50 percent of the work itself and to subcontract at least 50 percent of all subcontracts to certified minority contractors. Because Urban offered no additional evidence of its ability to satisfy the experience requirements, the District found Urban nonresponsible.

We have long held that a procuring agency has broad discretion in making responsibility determinations. Deciding a prospective contractor's probable ability to perform a contract involves a forecast which must of necessity be a matter of judgment. Such judgment should, of course, be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative

discretion of the contracting agency involved. The agency logically is in the best position to assess responsibility since it must bear the major brunt of any difficulties experienced in obtaining required performance and must maintain day-to-day relations with the contractor. Armor Elevator Company - Memphis, Inc., B-209775, April 15, 1983, 83-1 CPD 415; 43 Comp. Gen. 229 (1963). Thus, we will not disturb an agency determination of nonresponsibility unless it lacks a reasonable basis. The Mark Twain Hotel, B-205034, October 28, 1981, 81-2 CPD 361.

Urban points out, and we agree, that our Office has taken the position that a contractor can meet experience requirements by relying on the experience of employees, even if such experience was gained while these employees worked for other employers. See A.R. & S. Enterprises, Inc., B-201924, July 7, 1981, 81-2 CPD 14. However, the precedent cited by Urban is not relevant to the facts presented in this case. In A.R. & S. Enterprises, and other similar cases, we allowed agencies to consider the experience of full-time employees, not part-time consultants who were employed by a firm other than the contractor.

In view of the District's concern with the propriety of the consultancy and its belief that a consultancy did not fall within the scope of our decisions which allow employees' experience to be considered in evaluating a firm's experience, we believe the District had a reasonable basis for finding Urban nonresponsible.

OPPORTUNITY TO CURE DEFICIENCIES

On November 4, 1983, Urban notified the District and our Office that it had an agreement to hire a full-time employee who had the necessary experience to fulfill the responsibility concerns raised by the District. Urban contends that, even if the District is correct in its assessment of the application of legal precedent to the effect of the part-time consultant on Urban's responsibility, the employment of this experienced precast concrete erection foreman would meet the responsibility criteria.

Had Urban presented this information at an earlier time we might have agreed with its argument. We have held that evidence of a firm's responsibility may be furnished at any time prior to award. Guardian Security Agency, Inc., B-207309, May 17, 1982, 82-1 CPD 471.

In this case, however, the additional evidence was presented 2 days after the District decided to award the contract to Smoot and on the day it was awarded. We require contracting officers to base responsibility decisions on the most current information available at the time of award; however, a procuring agency is not required to delay award indefinitely while a bidder attempts to cure the causes for the firm being found nonresponsible. Roarda, Inc., B-204524.5, May 7, 1982, 82-1 CPD 438.

We do not agree with Urban's assertion that it should have been afforded an opportunity to correct this deficiency in its proposal. Urban was notified on September 15, 1983, that the District did not have adequate information to find it responsible, yet it waited until November 4, after it was notified that the District intended to make award to the next lowest bidder, to provide the additional information. Under these circumstances, where the protester had ample opportunity to supply additional information regarding its responsibility, the District acted reasonably in finding Urban nonresponsible and awarding the contract to the next low bidder.

SMOOT'S RESPONSIBILITY

Urban additionally asserts that the District awarded the contract to Smoot without requiring the same evidence of Smoot's experience as it did of Urban. Urban cites as evidence of Smoot's nonresponsibility an advertising brochure describing Smoot's operations which does not refer to precast concrete erection.

If this were not a court-requested decision, we would dismiss as academic Urban's assertion that the District's affirmative determination of Smoot's responsibility was unfounded. Under our Bid Protest Procedures, a nonresponsible offeror is not an interested party to protest the award to the next low bidder where it does not appear that cancellation and resolicitation of the procurement would be warranted. See Community Economic Development Corporation, B-211170, August 23, 1983, 83-2 CPD 235. In view of the facts present in this case, even if Urban's allegation were correct, Urban would not be an interested party since there is a third low bidder, G & C Construction, to whom award could be made. See E.J. Natchway, B-209562, January 31, 1983, 83-1 CPD 104.

As a general rule, our Office will review an agency's affirmative determinations of a bidder's responsibility only if fraud on the part of the contracting official is alleged or, as here, if the solicitation contains definitive responsibility criteria which allegedly have not been applied. Janke & Company, Inc., B-210756, February 22, 1983, 83-1 CPD 183. Definitive responsibility criteria are specific and objective standards established by an agency for a particular procurement for the measurement of a bidder's ability to perform the contract. These special standards limit the class of bidders to those meeting specified qualitative and quantitative qualifications necessary for contract performance. Watch Security, Inc., B-209149, October 20, 1982, 82-2 CPD 353.

Since this solicitation did contain definitive responsibility criteria regarding a firm's experience as an installer of precast concrete, as discussed, supra, the District is required to apply these criteria in reaching a responsibility determination. Our review of the District's determination is limited to determining whether Smoot has submitted evidence from which the contracting officer could reasonably conclude that the definitive responsibility criteria had been met. Johnson Controls, B-200466, February 20, 1981, 81-1 CPD 120.

The record indicates that the District evaluated the experience of the successful bidder and found Smoot to be responsible. Essentially, the information provided to the contracting officer indicated that Smoot intended to perform the precast concrete work with its own crew whose members had the requisite experience to meet the responsibility criteria in the solicitation.

Our Office will not object to a contracting officer's affirmative determination of responsibility unless it is shown to be without a reasonable basis. In this instance, the contracting officer had objective evidence relevant to the definitive responsibility criteria and favorable to Smoot at the time he made his determination. This in itself is sufficient to satisfy our review standard. The relative quality of the evidence is a matter for the judgment of the contracting officer, not our Office. Courier-Citizen Company, B-192899, May 7, 1979, 79-1 CPD 323.

The protest is denied.

Harry R. Van Cleve
for Comptroller General
of the United States